ORAL ARGUMENT SCHEDULED FOR JANUARY 16, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 93-1110
(and consolidated cases)

JAMES L. MELCHER,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT REPLY BRIEF OF INTERVENORS RURAL TELECOMMUNICATIONS GROUP AND INDEPENDENT ALLIANCE IN SUPPORT OF PETITIONER NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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September 29, 1997

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GLOSSARY OF TERMS and ABBREVIATIONS

Act	Communications Act of 1934, as amended, codified at 47 U.S.C. §§ 151 *et seq.*
Commission	Federal Communications Commission
LEC	Local Exchange Carrier
LMDS	Local Multipoint Distribution Service
Order	*In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and For Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer's Preference: Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, PP-22, FCC 97-82 (rel. Mar. 13, 1997).
RTG/IA	Rural Telecommunications Group/Independent Alliance

REPLY BRIEF OF INTERVENORS
RURAL TELECOMMUNICATIONS GROUP and
INDEPENDENT ALLIANCE

SUMMARY OF ARGUMENT

The Rural Telecommunications Group ("RTG") and the Independent Alliance ("IA") respectfully submit that the Commission's interpretation of Section 309(j) contradicts the plain meaning of that statute and is therefore not entitled to deference. Even assuming, *arguendo*, that Section 309(j) could be interpreted to permit limitation of rural telephone company participation in spectrum-based services, the Commission's action in the *Order* under review is arbitrary and capricious. The Commission failed to consider less restrictive alternatives and failed to adopt policies that will otherwise meet the statutory mandate to promote the dissemination of licenses among rural telephone companies. Accordingly, the Commission's decision to impose an in-region eligibility restriction on rural telephone companies should be vacated.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF SECTION 309(J) CONFLICTS DIRECTLY WITH THE PLAIN LANGUAGE OF THE STATUTE, AND IS THEREFORE NOT ENTITLED TO DEFERENCE.

The Commission attempts to selectively read and apply Section 309(j) in a manner that departs from its Congressional mandate. The Commission ignores the requirement of Section 309(j)(3)(B) to include rural telephone companies among the classes of applicants to which licenses are to be disseminated. FCC Brief at 38; *see also Order* at para. 158 (JA at **). In pertinent part, the statute directs:

> disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

47 U.S.C. § 309(j)(3)(B) (emphasis added).

The Commission, however, simply ignores the clause "including . . .rural telephone companies," and rewrites the statutory directive to exclude rural telephone companies. Indeed, even Intervenors for Respondents identified rural telephone companies as "one example of the 'wide variety of applicants' that Congress directed the Commission to *ensure* has access to licenses." Brief for Intervenors WebCel, *et al.* at 30 (emphasis added). The Commission's reading of Section 309(j) is flawed and its restriction on rural telephone company eligibility is impermissible.

Contrary to the Commission's contention that it has latitude to impose eligibility restrictions on rural telephone companies, *see* FCC Brief at 40, 41, Section 309(j)(4)(D) states, in pertinent part:

> In prescribing regulations pursuant to paragraph (3), the Commission **shall**--
> (D) **ensure** that . . . **rural telephone companies** . . .are **given the opportunity to participate** in the provision of spectrum-based service and for such purposes, **consider** the use of tax certificates, bidding preferences, and other procedures;

47 U.S.C. § 309(j)(4)(D) (emphasis added). No construction or excuse offered by the Commission alters the fact that the rules it has adopted directly contradict the statutory mandate cited above. The Commission has, in fact, taken action that ensures that some rural telephone companies will have no opportunity to participate in the provision of LMDS spectrum-based services in their service areas.

The Commission again selectively reads Section 309(j) in a manner that ignores the mandate to permit rural telephone company eligibility by suggesting that its responsibility to

balance various policy concerns provides it with the authority to impose eligibility restrictions. FCC Brief at 41. Section 309(j), however, is clear with respect to the mandate to provide rural telephone companies with, *at minimum*, an opportunity to acquire spectrum licenses. To the extent that the Commission has any statutory authority to "balance" policy concerns regarding rural telephone company participation, the Commission may only consider whether or not to award tax preferences or bidding preferences, or to adopt other procedures that will encourage rural telephone company participation in the provision of spectrum-based services.

The Commission is simply incorrect in its claim that its imposition of restrictions on rural telephone company eligibility is justified by a perceived need to balance the various goals set forth in Section 309(j)(3)(A)-(D). FCC Brief at 38.[1] The Commission's approach to "balancing" the objectives of the statute is inherently flawed, because while the statute presents multiple goals, it does not establish unclear or conflicting goals with respect to rural telephone company eligibility. There exists no right nor need for the Commission to interpret the statute in a manner that advances one goal while ignoring the other.

Prohibiting any rural telephone company from eligibility to hold LMDS licenses is not necessary to foster competition in rural areas. Contrary to the inaccurate assumption of the Commission and other parties, RTG/IA do not seek "set-aside[s]" or guarantees. *See* Brief for Intervenors WebCel, *et al.*, at 30; *see* FCC Brief at 40. In this proceeding, RTG/IA seek

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[1]/ An example of the Commission's flawed reasoning is apparent in its claim that "the interests of the public 'residing in rural areas' do not always and necessarily coincide with the interests of rural telephone companies." FCC Brief at 39. This assertion is irrelevant to the statutory directive that the Commission promote the participation of rural telephone companies.

simply to ensure the provision of the right mandated by Congress for rural telephone companies to have the opportunity to provide spectrum-based services in their service area.

The plain language of Section 309(j) establishes a clear Congressional mandate to promote the dissemination of licenses among rural telephone companies and to ensure the opportunity for rural telephone companies to participate in spectrum-based services. 47 U.S.C. 309(j)(3)(B) and (D). The statute is not, as alleged by Intervenors for the Respondents, "ambiguous." Brief of Intervenors WebCel, *et al.*, at 30. Rather, the Commission's interpretation is directly contrary to the plain reading of the statute. It is, therefore, not entitled to deference. *See National Railroad Passenger Corporation v. Boston & Maine Corporation*, 503 U.S. 407, 417 (1992) (*citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and *Kmart Corp. v. Cartier, Inc., et al.*, 486 U.S. 281, 292 (1988)). Accordingly, the Commission's imposition of the eligibility restriction upon rural telephone companies should be vacated.

II. THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN ADOPTING RULES THAT FAIL TO MEET THE OBJECTIVES OF THE STATUTE.

Assuming, *arguendo*, that Section 309(j) is not clear on its face, the eligibility restriction on rural telephone companies imposed under the *Order* would still not be sustainable. The record demonstrates that the Commission's decision to adopt an eligibility restriction for rural telephone companies was arbitrary and capricious because the Commission failed to (a) consider less restrictive alternatives, (b) ensure the participation of rural telephone companies, and (c) consider universal service policies.

A. The Commission Failed to Consider Less Restrictive Measures.

The objectives of Section 309(j) are neither ambiguous nor mutually exclusive. However, assuming, *arguendo*, that a restriction on rural telephone company eligibility could be consistent with the statute, the Commission's interpretation of the statute was arbitrary and capricious because the Commission did not address reasonable alternatives to the imposition of an eligibility restriction.

In addition to ignoring plans proposed to the Commission by RTG and IA,[2] the FCC ignored the Federal Trade Commission ("FTC") recommendation of a uniform pricing plan that would have effectively assuaged the Commission's apprehension of anti-competitive behavior.[3] Although a rulemaking cannot be "found wanting simply because the agency failed to include every alternative device," the Commission is nevertheless required to consider reasonably obvious and less restrictive alternatives, *see City of Brookings Municipal Telephone Company, et al., v. Federal Communications Commission*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) ("*Brookings*") (*citing Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511, n.54 (D.C. Cir. 1984), *cert. denied* 469 US 1034 (1984)), and explain its failure to adopt less restrictive measures. *See Cincinnati Bell Telephone Company, et al. v. Federal Communications Commission*, 69 F.3d 752, 761 (6th Cir. 1995) ("*Cincinnati*") (*citing Brookings*, 822 F.2d at 1169). The imposition of a restriction that precludes the participation of entities for whom Congress had "particular concern," *Cincinnati*, 69 F.3d at 762, was neither justified nor

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2/ *Comments of Ad Hoc RTG* at 7 (predecessor in interest to RTG) (JA at **); *Reply Comments of IA*, pp. 6-8 (JA at **).

3/ *Comments of Federal Trade Commission* at note 41 (JA at **).

explained. Accordingly, the Commission decision with respect to the eligibility restriction imposed on rural telephone companies should be vacated.

B. The Commission Failed to Provide Mechanisms that Ensure the Participation of Rural Telephone Companies as Required by the Statute.

The Commission asserts that it has met its statutory obligation to provide opportunities for rural telephone companies to deploy wireless services by permitting rural telephone companies to (1) acquire LMDS licenses outside of their service areas; (2) hold an in-region 150 MHz license; (3) divest overlapping interests; or (4) partition or disaggregate spectrum. FCC Brief at 39. The record, however, demonstrates that these alternatives are factually and legally insufficient to meet the statutory mandate that rural telephone companies be provided the opportunity to participate in the utilization of LMDS spectrum.

1. The Opportunity for a Rural Telephone Company to Obtain a License Outside of its Service Area is Not Sufficient to Meet the Statutory Mandate.

The Commission argues that the opportunity for a rural telephone company to obtain LMDS licenses outside of its service area is sufficient to meet the Congressional Section 309(j) directive. This argument defies common sense. The overall legislative history of Section 309(j) demonstrates that Congress included rural telephone companies among the designated entities to which spectrum licenses are to be disseminated, in part, to encourage the deployment of new technologies and services in the rural areas they serve. Congress was not simply trying to ensure rural telephone company participation in urban market areas that are unassociated with

their rural service commitment.[4] Accordingly, the provision of the opportunity to provide LMDS services outside of a rural telephone company's service area does not satisfy the Congressional mandate to provide rural telephone companies with opportunities to acquire spectrum licenses.

2. The 150 MHz License is Not a Legitimate Alternative to the Participation Envisioned by the Statute.

The Commission argues that it has fulfilled its duty to provide opportunities for rural telephone companies by making them eligible to hold an in-region 150 MHz license. FCC Brief at 39. However, the 150 MHz license is not a valid substitute for the 1,150 MHz license. The Commission has noted that 1,000 megahertz of LMDS spectrum is required to provide video and telephony services. *Order* at paras. 124, 127 (JA at **). The Commission cannot cavalierly claim that eligibility for spectrum that it acknowledges to be insufficient for its intended purposes fulfills the statutory mandate. Contrary to the Commission's contention, eligibility for the insufficient 150 MHz license does not fulfill the Commission's mandate to promote opportunities for rural telephone companies.

3. Provision of Service Under the Divesture Rules Fails to Meet the Statutory Objective.

The Commission asserts that its divesture rules provide adequate opportunity for rural telephone companies to participate in the utilization of LMDS spectrum. FCC Brief at 39. The

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[4] The irrational nature of a rule that precludes a rural telephone company from eligibility to hold a license where it provides telephone service is further supported by the universal service policies Congress has adopted to promote the deployment of new services and technologies in rural areas. *See infra* 9-11. The RTG/IA Brief sets forth a full discussion of the illogic of restricting any rural telephone company from eligibility to hold an in-region license. *See* RTG/IA Brief at 23, 28-29.

Commission's assertion is incorrect. The Commission's rules compel a rural telephone company to divest either the overlapping telephone service area or the overlapping LMDS service area. 47 C.F.R. § 101.1003(f). Exercise of either approach results in the rural telephone company's inability to utilize LMDS within its service area. The Commission's tortured reasoning suggests that the rural telephone company should abandon its commitment to provide basic services in its rural service area in order to obtain the right to utilize LMDS spectrum in that rural area. This result is clearly contrary to Section 309(j). Opportunities to provide service under the divesture rules are as statutorily deficient as those available under the eligibility restriction: both deny a rural telephone company the opportunity to provide service in its rural service area. Therefore, the divesture rules neither justify nor cure the statutory deficiencies inherent in the rural telephone company eligibility restriction.

4. The Eligibility Restriction Imposed on Rural Telephone Companies is Not Cured by Provisions for License Partitioning and Spectrum Disaggregation.

The Commission claims that partitioning and disaggregation mechanisms provide statutorily-sufficient opportunities for rural telephone companies. FCC Brief at 39. These mechanisms, however, are hollow and disingenuous offers that do not address the Commission's statutory mandate. Spectrum which becomes available pursuant to a partitioning or disaggregation opportunity is still subject to the eligibility restriction imposed upon rural telephone companies. *See id.* Moreover (and as noted *supra* n.2 and accompanying text), the Commission ignored proposals for partitioning and disaggregation that would promote rural telephone company participation, and left the decision to partition or disaggregate a license solely to the prerogative of the license holder. Under its rules, the Commission cannot compel a

licensee to partition or disaggregate its spectrum; therefore, the Commission cannot rely upon the partitioning and disaggregation mechanisms to fulfill its responsibility to provide opportunities for rural telephone companies. Section 309(j) charges the *Commission*, not the license holders, with the duty to ensure the opportunity for participation by rural telephone companies.

The Commission cannot justify its eligibility restriction on the grounds that alternative means of participation exist because neither the out-of-region license, the 150 MHz license, divesture, partitioning, nor disaggregation provide statutorily-sufficient opportunities for rural telephone companies. Accordingly, the eligibility restriction imposed on rural telephone companies is arbitrary and capricious, and should be vacated.

C. The Commission Failed to Consider Universal Service Principles.

The Commission's inappropriate restriction on rural telephone company eligibility to obtain LMDS spectrum is not only contrary to Section 309(j), but is also in conflict with the principles of universal service that underlie our Nation's telecommunications policies. Contrary to its assertion (FCC Brief at 44), the Commission ignored the equally important goal of promoting universal service.

The Telecommunications Act of 1996[5] recognizes the vital participation of rural telephone companies in the provision of telecommunications services to rural America, and encourages and provides for the continued participation of rural telephone companies in meeting the evolving universal service objectives in the areas they serve. *See, e.g.*, 47 U.S.C. §§ 251(f), 254. The services available through the utilization of LMDS spectrum are contemplated

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5/ Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

for inclusion in the evolving definition of universal service pursuant to the 1996 Act. *See Reply Comments of the IA* at 3-5 (JA at **); *see also* 47 U.S.C. § 254(c)(1).

The 1996 Act sets forth policies which address the objectives of both competition and universal service. In addressing these dual objectives, Congress specifically identified the need for distinct policies addressing the public interest in the areas served by rural telephone companies. *See* 47 U.S.C. §§ 251(f), 254. These policies recognize the essential role of rural telephone companies in meeting universal service obligations within the areas they serve. In fact, the 1996 Act does not permit the designation of more than one carrier to be eligible to receive universal service funding in the absence of a specific determination by the *state* commission that the public interest will be served by the designation of more than one eligible telecommunications carrier. 47 U.S.C. § 214(e)(2).

Clearly, a class of carriers which Congress has recognized as essential providers of universal services in their rural service areas should not be precluded from providing new services to their service areas. Even if Section 309(j) did not exist, the Commission's application of an eligibility restriction to rural telephone companies would be unjustifiable and contrary to the universal service policies and objectives set forth in the 1996 Act. The Commission's eligibility restriction should be vacated because it irrationally prevents the only eligible universal service providers in rural areas from utilizing new technologies to provide universal service.[6]

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[6]/ The Commission's flawed reasoning is further demonstrated by its reliance on Section 257. 47 U.S.C. § 257. The Commission has improperly cited its authority to eliminate barriers to market entry under Section 257 as a basis for ignoring Section 309(j) and imposing eligibility restrictions on rural telephone companies. Section 257 clearly does not give the Commission authority to ignore Section 309(j) or the universal service policies established

The record in this proceeding contains suggested methods of harmonizing the dual Congressional goals of promoting competition and furthering universal service principles. *See Reply Comments of IA* at 6-8. The Commission addressed neither the goal of universal service nor the suggested alternative approaches to accommodate both objectives. The Commission's failure to consider these matters, and its decision to instead impose an in-region eligibility restriction on rural telephone companies, is both arbitrary and capricious, and fails to meet the universal service mandate. *See* 47 U.S.C. § 254. Accordingly, the eligibility restriction should be vacated.

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with specific respect to rural telephone companies. To the contrary, Sections 251(f) and 254 of the Act, which respectively provide exemptions from certain types of interconnection for rural telephone companies and set forth universal service objectives, are intended to promote the public interest by ensuring that the Commission consider the impact of the introduction of competition on universal service goals. 47 U.S.C. §§ 251(f), 254.

CONCLUSION

The Commission decision to impose an eligibility restriction upon rural telephone companies collides with the language of a clear and unambiguous statute, and is therefore not entitled to deference.

Assuming, *arguendo*, that the statute is not plain on its face, the Commission's action was arbitrary and capricious because the Commission did not consider less restrictive alternatives and failed to furnish alternative mechanisms that meet the objective of the statute.

Accordingly, the Commission's *Order* with respect to the eligibility restriction imposed on rural telephone companies should be vacated.

Respectfully submitted,

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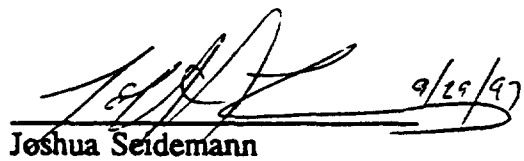
CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Joshua Seidemann, hereby certify that the foregoing "Joint Reply Brief of Intervenors Rural Telecommunications Group and Independent Alliance" in Case No. 93-1110 contains no more than 3,000 words, consistent with the Order of the Court dated July 25, 1997.



9/25/97

Joshua Seidemann

CERTIFICATE OF SERVICE

I, Joshua Seidemann, hereby certify that copies of the foregoing **"Joint Reply Brief of Intervenors Rural Telecommunications Group and Independent Alliance in Support of Petitioner National Telephone Cooperative Association"** were served on this 29th day of September 1997, by first class, U.S. mail, postage prepaid, to the following parties:

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